

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

Docket No. 77-1390

77-1390

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JAIME RAYO,

Appellant.

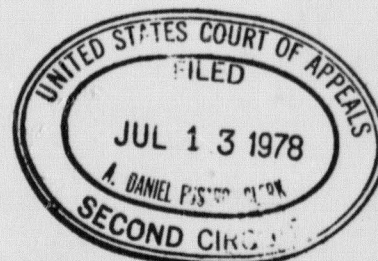
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p/s*

On Appeal From the United States District
Court for the Southern District

PETITION FOR REHEARING WITH A SUGGESTION
FOR REHEARING EN BANC

David Blackstone
Donald E. Nawi
of counsel

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Jaime Rayo



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

- v -

Docket No. 77-1311

JAIME RAYO,

Appellant.
-----x

PETITION FOR REHEARING WITH A
SUGGESTION FOR REHEARING
EN BANC

TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

On June 30, 1978 this Court affirmed the Southern District drug convictions of petitioner Rayo and his co-appellants Arroyo, Gomez and Moreno. We petition for rehearing but more realistically an en banc on the cooperation agreement issue (1) because two members of the panel held sharply divergent views on the issue, (2) because another active member of the Circuit has expressed views in accordance with the concurring opinion (which we think should become the view of the full Court), and (3) because the prior Second Circuit decisions were read improperly to foreclose an issue that in fact is open for the closer scrutiny it deserves.

1. We cannot improve on Judge Friendly's concurring

opinion's analysis of the basic cooperation agreement problem and the manner in which it should be handled. The problem is not only one of timing (Rayo Slip. Op. 3802-03), but that the very terms of the agreement, spiced with the Assistants' comments thereon (not only in this case) create false and misleading considerations for the jury. The district judges, we submit, should be directed to face and then deal with the issues in advance of jury arguments and in accordance with Judge Friendly's analysis.

2. On August 16, 1977 Judge Van Graafeiland delivered a bench opinion in United States v. Miller, 77-1169 (Appendix A hereto) analyzing the identical problem in much the same terms as Judge Friendly did here. We are advised it is appropriate to call this unreported, informal opinion to the Court's attention to show the divergence in views within the Circuit requiring an en banc and because Judge Van Graafeiland as well will consider this petition.

3. In United States v. Aloï, 511 F.2d 585 (2d Cir. 1975) (Slip. Op. p. 3802) the Government used a cooperation agreement much as the Assistant did here. This Court had difficulty with that, but found it had not deprived appellants of a fair trial "considered in light of all the circumstances." 511 F.2d at 598. United States v. Araujo, 539 F.2d 287 (2d Cir. 1976) followed Aloï's all the circum-

stance reasoning in reaching a similar result. 539 F.2d at 290. Judge Van Graafeiland, whose criticism of the Government on the subject has just been outlined, wrote that opinion and joined as well in United States v. Ricco, 549 F.2d 264 (2d Cir. 1977) which in any event is distinguishable (Rayo Slip. Op. p. 3811). The issue, then, is by no means a closed one.

CONCLUSION

There should be a change in the Government's repeated and misleading use of the cooperation agreements. The panel's majority opinion possibly narrows the Government's options on the timing issue but otherwise widens the permissible approach because of its failure to agree with the analysis and criticism of the concurrence. An en banc is necessary to correct that. We join in addition in any other points co-appellants might raise on re-hearing, to the extent applicable, particularly on the in camera issue.

David Blackstone
Donald E. Nawi
of counsel

Respectfully submitted,

DAVID BLACKSTONE
Attorney for Appellant
Jaime Rayo

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

DONALD E. NAWI, being duly sworn, deposes and
says:

I am one of the attorneys for appellant Jaime
Rayo. I make this certificate in compliance with the
rules of this Court. In my judgment the foregoing petition
is well founded and is not frivolous or interposed for
delay.

Donald E. Nawi

Sworn to before me this
13th day of July, 1978.

Victor J. Herwitz

VICTOR J. HERWITZ
Notary Public, State of New York
No. 31-177225
Certificate filed in New York County
Commission Expires March 30, 1979

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases.)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

APPENDIX A

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-v- :

Docket No. 77-1169

EUGENE WELCOME, DEWITT OWENS, :

DORIS ELAINE MILLER, :

Defendants, :

EUGENE WELCOME, DORIS ELAINE :

MILLER, :

Defendant-Appellant. :

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Before:

HON: ELLSWORTH A. VAN GRAAFEILAND, WILLIAM H.
WEBSTER*, Circuit Judges, and JOHN F.
DOOLING, JR.**, District Judge.

New York, August 16, 1977

Statement made by the court as disposition of appeal
in open court.

JUDGE VAN GRAAFEILAND:

We're going to decide this case right now from the bench. As far as the fundamental appeal from the judgments of conviction is concerned, we're going to affirm. These are appeals from convictions on two counts of bank robbery, and one count of receiving the proceeds of such robbery. There was ample evidence to support the jury's verdict against both

*Honorable William H. Webster, Circuit Judge, Eighth Circuit, St. Louis, Missouri, sitting by designation.

**Honorable John F. Dooling, Jr., District Judge (Senior), United States District Court, Eastern District of New York, Brooklyn, N.Y., sitting by designation.

defendants.

Evidence of the subsequent robbery participated in by appellant Welcome and Vanessa Hodges was properly admitted as proof of a common scheme or plan to rob banks and to use the proceeds for the purchase of stores. In addition, the modus operandi of the two robberies was similar. Finally, the evidence dealt directly with the issue of whether appellant Miller, knowingly received the proceeds of the first robbery.

There was no prejudicial restriction of defendants' cross-examination of the witness Gilbert in the Simmons hearings. The photographs in issue spoke for themselves, and defendants' counsel had an opportunity to pursue the matter again on the trial. We see no abuse of the trial court's discretion. See United States v. Green, 523 F.2d 229.

We find no merit, whatever, in appellants' assertions that the district judge was biased and prejudiced against them and that they were thus deprived of a fair trial.

We caution the government, as we have before, against the increasingly strong arguments they are making concerning the motives of accomplice witnesses, insofar as they relate to their agreements with the government. Prosecutors are reaching the brink of reversible error in their attempts to have the government vouch for the witnesses' credibility. In a close case, which this is not, a summation such as this may lead to reversal. However, in this case, the judgments are affirmed.

We do find, however, that imposition of concurrent sentences on the two counts is improper, inasmuch as count two is a lesser included offense in count three. See Gorman v. United States, 456 F.2d 1258 (2d Cir. 1972). So we are remanding the matter to the district court, solely for consideration on the question of sentence. Otherwise, the judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-v-

Docket No. 77-1390

JAIME RAYO,

Appellant.

-----X

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the petition
for re-hearing in the within case to each of the following
on July 13, 1978:

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